Supreme Court, U.S.
FILED

No. 02 1757 MAY 22 2003

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Supreme Court of the United States

WILLIAM C. BOND,

Petitioner,

v.

KENNETH BLUM, SR.; KENNETH BLUM, JR.;
DUDLEY F. B. HODGSON;
MCDANIEL, BENNETT & GRIFFIN;
ADELBERG, RUDOW, DORF & HENDLER, LLC;
WILLIAM SLAVIN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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70 pp

QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR BY ADOPTING A *PER SE* RULE THAT THE USE OF AN ENTIRE UNPUBLISHED MANUSCRIPT AS EVIDENCE IN A PUBLIC COURT PROCEEDING IS FAIR USE AS DEFINED BY 17 U.S.C. § 107?

II. MAY A DISTRICT COURT GRANT SUMMARY JUDGMENT TO AN ALLEGED INFRINGER IN A COPYRIGHT CASE ON THE GROUND THAT THE USE OF AN ENTIRE UNPUBLISHED MANUSCRIPT AS EVIDENCE IN A PUBLIC COURT PROCEEDING WAS FAIR USE AS DEFINED BY 17 U.S.C. § 107 WHEN THERE IS NO EVIDENCE IN THE RECORD CONCERNING THE EFFECT OF THE USE ON THE POTENTIAL MARKET FOR OR VALUE OF THE COPYRIGHTED WORK?

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Petitioner, William C. Bond, requests the Supreme Court of the United States to grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-captioned proceeding on January 24, 2003. (Petitioner's Appendix ("Pet. App.") 1a.)

REFERENCE TO OPINIONS BELOW

The opinions below are: *Bond v. Blum*, 317 F.3d 385 (4th Cir. 2003) (Pet. App. 1a); Memorandum and Order, January 4, 2002 (Pet. App. 29a); and oral opinion in open court, November 20, 2001 (Pet. App. 32a).

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fourth Circuit, for which Petitioner seeks review, was entered on January 24, 2003. (Pet. App. 1a.) On February 7, 2003, Petitioner filed a Petition for Rehearing and Suggestion For Rehearing *En Banc*, which was denied by an order filed on February 26, 2003. (Pet. App. 37a.) Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

> 17 U.S.C. § 107. Limitations on exclusive rights: Fair use
> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that

section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include--

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all of the above factors.

STATEMENT OF THE CASE

This case comes to this Court on appeal from a summary judgment granted at the outset of the case in favor of the Defendants on the ground of fair use, where neither party presented evidence concerning the effect of the use on the potential market for or value of the copyrighted work.

Petitioner William C. Bond is the author of an unpublished 396-page manuscript entitled "Self Portrait of a Patricide–How I Got Away With Murder", a fictionalized and highly embellished account of his experience as a juvenile in which he was found delinquent in the death of his father. Bond circulated his manuscript through a literary agent in order to find a publisher but was unsuccessful. Petitioner entrusted possession of the manuscript and related materials to his attorney, Norman Pessin, who represented Petitioner and his wife, Alyson, with regard to the manuscript and other matters, including an on-going domestic dispute with Alyson's former husband, the Defendant, William Slavin. Without Bond's knowledge or permission, the widow of Bond's attorney gave the unpublished manuscript and five other unrelated, unpublished manuscripts authored by Bond to the Defendant, Dudley F. B. Hodgson, an investigator working for Defendant Kenneth Blum, Sr., Alyson's father.

Without the knowledge or authorization of the Petitioner, the investigator made copies of the entire 396-page manuscript and gave one entire copy to Blum, who, in turn, made more copies and distributed the copies in their entirety to other defendants. The investigator also gave an entire copy of the manuscript to the Maryland State Police. The Defendant attorneys made copies of the entire unpublished manuscript and used them in their entirety in state court proceedings against Alyson in a child custody dispute with her former husband, a matter in which Pessin had represented her. Petitioner was not a party to those proceedings. Defendants used copies of the

manuscript freely in discovery and introduced a copy in its entirety, without its being sealed, into evidence in the state court custody proceedings. Defendants knew that they did not have Bond's permission to take and copy the unpublished manuscript–let alone take it to copy for use against his wife in the domestic case.

Jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1338(a), in that Petitioner William C. Bond filed a civil action for copyright infringement under the copyright laws of the United States, i.e., 17 U.S.C. § 501 *et seq*. The complaint sought injunctive relief. Defendants filed motions to dismiss or, in the alternative, for summary judgment based on the fair use exception in 17 U.S.C. § 107. After granting summary judgment, the District Court denied (Pet. App. 29a) Petitioner's motion to alter or amend the judgment, which requested specifically that the District Court order that Defendants' use in and during the domestic case be restricted to that case, that Defendants' possession and use of Petitioner's work in the domestic case be restricted to use by counsel only and by the Circuit Court for Baltimore City and that, at the conclusion of the custody case, Defendants account for and return all their copies of the work to the Petitioner through his counsel.

Petitioner invoked the jurisdiction of the Court of Appeals pursuant to 28 U.S.C. § 1291. The Fourth Circuit affirmed, concluding that an alleged infringer's use of the copyrighted manuscript as evidence in the court proceeding was subject to the defense of fair use because there was no evidence that Defendants' use of the manuscript would harm the potential market for

the manuscript. (Pet. App. 15a-20a.) The District Court awarded Defendants attorneys' fees totaling $181,744.14.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit's fair use analysis is a radical departure from and conflicts with this Court's instruction in three fair use cases, as well as the instructions of Congress embodied in 17 U.S.C. § 107, that the lower courts engage in an "equitable rule of reason" analysis and conduct "a sensitive balancing of interests", avoiding the application of *per se* rules. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 454-55 (1984); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 552, 560 (1985); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 n.21 (1994). Title 17, § 107 by its own terms requires the courts to consider each of four mandatory non-exclusive factors in determining whether a use of copyrighted work is fair. The Court of Appeals, however, examined only the first of the four mandatory factors enumerated in 17 U.S.C. § 107 and failed to conduct a "sensitive balancing of interests" and announced a *per se* rule and exemption to the Copyright Act. The decision of the Fourth Circuit is also in direct conflict with and overlooks the holding in *Campbell*, 510 U.S. at 590-94, that summary judgment cannot be granted on the ground of fair use where there is no evidence in the record concerning the effect of the use on the potential market for or value of the copyrighted work. The decision is likewise in conflict with those of the Second Circuit. The public importance of this decision is substantial because it

effectively announces a court-use exemption to the Copyright Act and countermands this Court's instruction concerning fair use analysis. The public importance of this decision is also substantial, given the public access to court records, particularly as court records make their way on-line through such means as, for example, PACER (Public Access to Court Electronic Records). The *per se* ruling in this case invites the courts to become the next Napster or the source for thesmokinggun.com.

THE COURTS BELOW FAILED TO CONDUCT A "SENSITIVE BALANCING OF INTERESTS" AND ANNOUNCED A *PER SE* RULE AND EXEMPTION TO THE COPYRIGHT ACT

> "'Take not from others to such an extent and in such a manner that you would be resentful if they so took from you.'" This "equitable rule of reason" permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster. *Harper & Row*, 471 U.S. at 550 n.3 (Citations omitted.)

The courts below failed to conduct a "sensitive balancing of interests" in order to narrowly tailor an appropriate injunctive remedy, particularly given the fact that the Defendants obtained the unpublished work, "Self Portrait of a Patricide–How I Got Away With Murder," without the author's permission or knowledge, under markedly questionable circumstances, and thereafter copied and placed an

entire 396-page copy, unsealed, into a public court record. While purporting to eschew *per se* rules for fair use analysis, the Fourth Circuit announced a universally applicable rule of law, holding as a matter of law that the unrestricted use of an unpublished manuscript in its entirety as evidence in a court proceeding is fair use unless the copyright owner proves harm to the potential market for the manuscript. (Pet. App. 15a-20a.) The Fourth Circuit also declared a rule of law that the use of a work in a court proceeding is a non-commercial or non-profit use. (Pet. App. 16a.)

The Fourth Circuit concluded that application of the first factor "weighs heavily against Bond's infringement claim...the narrow purpose of defendants' use of the manuscript is for the evidentiary value of its content insofar as it contains admissions that Bond may have made against his interest when he bragged about his conduct in murdering his father, in taking advantage of the juvenile justice system, and in benefitting from his father's estate." (Pet. App. 16a.) The Fourth Circuit then mechanically applied the rationale of the first factor to override the second and third factors without individual analysis of those two factors. (Pet. App. 17a-19a.) Thus, the Court of Appeals gave "virtually dispositive weight" to use of the work as evidence and confined its analysis to one relevant factor. *But see Campbell*, 510 U.S. at 583 ("The Court of Appeals, however, immediately cut short the enquiry into...[the] fair use claim by confining its treatment of the first factor essentially to one relevant fact, the commercial nature of the use....In giving

virtually dispositive weight to the commercial nature of the parody, the Court of Appeals erred.").

In analyzing the first statutory factor–the purpose and character of the use–the Court of Appeals found the use to be for the provision of relevant information to a child custody dispute. While use in litigation may very well be a socially beneficial purpose, that should have been but the beginning, not the end, of the inquiry. Regrettably, that determination served as the critical justification for the court's entire analysis. Rather than looking objectively at all of the facts and factors involved in this particular case, the court over-simplified and generalized its analysis based on this one conclusion that "the use of the work is not related to its mode of expression but rather to its historical facts."

Fair use might accommodate certain uses in court, but it will not fit all such uses without a *per se* rule. While the intended use of the work in this case was for introduction into a court proceeding as evidence to demonstrate the character of a non-party to that action, the purpose and character of the use may not be superficially established simply by generalizing its use as evidence to present facts in a court proceeding. *Harper & Row* explicitly rejected such generalizations for a more complex and subtle analysis ("sensitive balancing") when the majority stated that simply invoking "news reporting" and the public interest in the presentation of facts (as opposed to the mode of expression) does not end the inquiry under the first factor. *See Harper & Row*, 471 U.S. at 557 ("The promise of copyright would be an empty one if it could

be avoided merely by dubbing the infringement a fair use 'news report' of the book."); 471 U.S. at 569 ("The Court of Appeals erred in concluding that...use of the copyrighted material was excused by the public's interest in the subject matter. It erred, as well, in overlooking the unpublished nature of the work and the resulting impact on the potential market for first serial rights of permitting unauthorized prepublication excerpts under the rubric of fair use."). Without a detailed inquiry and sensitive balancing, there emerges, as here, a universal rule of law that is not case or circumstance specific and which is applicable to all uses in court proceedings.

The Fourth Circuit also did not address, in the context of the character of the use, the dispute whether the unauthorized manner in which Defendants obtained (purloined, as Petitioner contended) and copied the manuscript outside the state court judicial processes was in good faith. *See Harper & Row*, 471 U.S. at 562-63 (explaining that the propriety of the defendant's conduct is relevant to the character of the use; knowing exploitation of purloined manuscript not compatible with "good faith" and "fair dealing" underpinnings of fair use doctrine).

The Court of Appeals did not assess the second factor--nature of the work--other than to reiterate that the use was justified by the legal proceedings. (Pet. App. 17a-18a.) The court virtually ignored that the manuscript was unpublished and did not address its status as such. *But see id.* 471 U.S. at 554 ("the unpublished nature of a work is '[a] key, though not necessarily determinative, factor' tending to negate a

defense of fair use.") *quoting* S. Rep. No. 94-473, p. 64 (1975).[1] The Copyright Act recognizes a distinct statutory right of first publication which had previously been afforded unpublished works under common law. *See* 17 U.S.C. § 106(3). (Pet. App. 40a.) A writer has the choice of when to release his work and how. Neither court below assessed the impact on the right of first publication of this particular work. The "[p]ublication of an author's expression before he has authorized its dissemination seriously infringes the author's right to decide when and whether it will be made public, a factor not present in fair use of published works." *Harper & Row*, 471 U.S. at 551, 555. The Court of Appeals failed here to address this factor, and the decision as such undermines the right of authors to first publication and effectively creates a *per se* rule and sweeping fair use right to use any unpublished work, *in toto*, in court proceedings for any purpose.

Putting the unpublished manuscript into a public record suggests wrongly to others, such as newspapers or journalists who otherwise may have paid for serialization rights, that they may copy it and quote it at length. The decision of the Court of Appeals invites extensive pre-publication quoting and copying of unreleased works by members of the public without the copyright owner's consent and poses a potential for

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[1] Subsequent to the Court's decision in *Harper & Row*, Congress amended § 107 to provide that: "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above [four] factors." 17 U.S.C. § 107.

substantial damage to the marketability of the first serialization rights in general and, therefore, is in conflict with *Harper & Row*. *See id.* at 569.

Like numerous other authors, many of whom ultimately become successful, Petitioner was discouraged several times from publication. A work not ready for public consumption open to the public in a court file, however, limits the author's ability to mold and improve it until he is ready to make it public. The Fourth Circuit's rigid application of its first factor analysis did not assess whether the unrestricted nature of the use would discourage the artistic and creative efforts of authors.

The Court of Appeals also did not assess the third factor--the amount and substantiality of the portion used in relation to the whole--other than to reiterate that the use was justified by the legal proceedings. (Pet. App. 18a-19a.) Neither court below assessed whether copies of only selective and limited portions of this 396-page work would have allowed Defendants to present the historical facts recounted in the Fourth Circuit's decision. (Pet. App. 4a-8a.) By contrast, Defendants designated only 31 pages of the manuscript for inclusion in the joint appendix in the Court of Appeals. Based on these limited portions, Defendants in their brief in the Court of Appeals were able to state those specific historical facts that they believed necessary to present in state court and to the Court of Appeals to demonize Bond. (Pet. App. 4a-8a.)

Defendants made no attempt below to link relevant portions of the 396-page work to their litigation need. Which parts of this 396-page work were necessary in this specific custody case? Were the reproduction and distribution of the entire work necessary to achieve this purpose, or were other options available to the Defendants that would be less harmful to the Petitioner's exclusive rights? Were remedial options available to the Defendants or the court to prevent compromising the rights of the copyright owner, beyond what was necessary for the intended use? None of these questions were entertained by the courts below, despite this Court's teachings in *Harper & Row* and in *Campbell*.

Neither court below allowed for any limitation on the number of copies of the manuscript that Defendants could make or considered procedures to safeguard the copies of the manuscript during Defendants' use or after Defendants' use was completed. Neither court applied a fair use analysis to these other copies. The scope of Defendants' use, as sanctioned by the *per se* rule of the courts below, was unreasonable and without basis in the factual record. Such a *per se* rule will have the effect of chilling the incentives to fix works of authorship of the type that the Copyright Act is intended to foster.

THE DECISION OF THE FOURTH CIRCUIT IS IN DIRECT CONFLICT WITH AND OVERLOOKS THE HOLDING IN *CAMPBELL V. ACUFF-ROSE MUSIC, INC.*, 510 U.S. 569, 590-94 (1994), THAT SUMMARY JUDGMENT CANNOT BE GRANTED ON THE GROUND OF FAIR USE, WHERE THERE IS NO EVIDENCE IN THE RECORD CONCERNING THE EFFECT OF THE USE ON THE POTENTIAL MARKET FOR OR VALUE OF THE COPYRIGHTED WORK

The fourth fair use factor in 17 U.S.C. § 107 "requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also 'whether unrestricted and widespread conduct of the sort engaged in by the defendant...would result in a substantially adverse impact on the potential market' for the original." *Campbell*, 510 U.S. at 590. In *Campbell*, the district court granted summary judgment in favor of 2 Live Crew on its fair use defense, holding that its song was a parody that made fair use of the original song. The Court of Appeals reversed on the ground that the commercial nature of the parody rendered it presumptively unfair under the first and fourth factors of § 107. In turn reversing, this Court held that 2 Live Crew was not entitled to summary judgment because it did not present any evidence on the fourth factor "addressing the likely effect of 2 Live Crew's parodic rap song on the market for a nonparody, rap version of 'Oh, Pretty Woman.'" *Id.* at 593-94.

Defendants in this case are in the exact same position as the defendant 2 Live Crew in *Campbell* because they failed to support their motion to dismiss

or, in the alternative, for summary judgment with any evidence addressing 17 U.S.C. § 107(4). In this case, neither court below conducted an analysis under the fourth factor because Defendants did not submit any evidence and there was none before the Court on the likelihood of harm to the market for or value of the copyrighted work, particularly if the use were to become widespread. There was nothing in the record for the Court to have assessed the fourth factor under § 107.[2] All the Panel could say about the fourth factor was that there is no evidence that "the admission into evidence of Bond's manuscript [in state court] would adversely affect its marketability." (Pet. App. 15a-16a, 19a-20a.)

Relying, however, on language from *Sony*, 464 U.S. at 451, the Fourth Circuit created a presumption in favor of fair use for non-commercial uses: "If a challenged use of a copyrighted work is noncommercial, the party alleging infringement must demonstrate 'either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work.'" (Pet. App. 15a-16a, 19a-20a.) The interpretation placed on *Sony*, 464 U.S. at 451, which is the very language relied upon by the Fourth Circuit in this case, was rejected in *Campbell*, where the Court clarified its language in *Sony*, at 451, emphasizing that fair use is an affirmative defense and there are no

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[2] The District Court decided against the Plaintiff as to subsection (4), noting that the value of the work would not decrease. (Pet. App. 35a-36a.) This is supposition with no supporting evidence in the record.

"categories of presumptively fair use" and "no hard evidentiary presumption". *Campbell*, 510 U.S. at 583-85.

The Fourth Circuit did not address the holding in *Campbell*. While citing *Campbell* for some general propositions of law in other parts of its opinion, the Fourth Circuit relied only on *Sony* and did not mention *Campbell* in its discussion of § 107(4). The Fourth Circuit, as such, did not address the holding in *Campbell*, its clarification of *Sony* and this Court's admonition that "it is impossible to deal with the fourth factor except by recognizing that a silent record on an important factor bearing on fair use disentitled the proponent of the defense...to summary judgment." *Id.* at 593-94.

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF THE SECOND CIRCUIT

The decision of the Court of Appeals is not only in conflict with *Campbell*, but is also in conflict with both pre-*Campbell* and post-*Campbell* decisions of the Second Circuit interpretation of *Sony*. *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1262 (2d Cir. 1986), *cert. denied*, 481 U.S. 1059 (1987); *American Geophysical Union v. Texaco Inc*, 60 F.3d 913 (2d Cir. 1994). In *Maxtone-Graham*, pre-dating *Campbell*, the court rejected that the language in *Sony*, 464 U.S. at 451, altered the traditional, multi-factored fair use analysis. 803 F.2d at 1262. The Court reasoned that "[o]nly an unduly narrow reading of the language in *Sony Corp.* and an inattention to the context could lead to the conclusion that the Court intended to attach heightened

significance to the element of commerciality." *Id.* In *American Geophysical Union*, decided the same year as *Campbell*, the court noted in its analysis that "*Campbell* warns against 'elevating ... to a per se rule' Sony's language about a presumption against fair use arising from commercial use" and that *Campbell* discards "that language in favor of a more subtle, sophisticated approach, which recognizes that 'the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.'" 60 F.3d at 921.

CONCLUSION

The Petition should be granted to resolve conflicts between the decision in this case of the Court of Appeals and decisions from this Court and the other courts of appeals. A decision by this Court will resolve the uncertainty that now exists by virtue of conflicting rulings on important questions of federal law and public importance. Alternatively, the Petition should be granted, the judgment vacated and the case remanded for further consideration in light of *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, and *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539.

Respectfully submitted,

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APPENDIX

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WILLIAM C. BOND,
Plaintiff-Appellant,

v. No. 02-1139

KENNETH BLUM, SR.;
KENNETH BLUM, JR.;
DUDLEY F. B. HODGSON;
MCDANIEL, BENNETT & GRIFFIN;
ADELBERG, RUDOW, DORF
& HENDLER, LLC;
CHRISTOPHER W. NICHOLSON;
WILLIAM SLAVIN,
Defendants-Appellees.

WILLIAM C. BOND,
Plaintiff-Appellee,

v. No. 02-1219

ADELBERG, RUDOW, DORF
& HENDLER, LLC,
Defendant-Appellant,

and

KENNETH BLUM, SR.;
KENNETH BLUM, JR.;
DUDLEY F. B. HODGSON;
MCDANIEL, BENNETT & GRIFFIN,
Defendants.

WILLIAM C. BOND,
Plaintiff-Appellant,

v. No. 02-1231

ADELBERG, RUDOW, DORF
& HENDLER, LLC,
Defendant-Appellee,

and

KENNETH BLUM, SR.;
KENNETH BLUM, JR.;
DUDLEY F. B. HODGSON;
MCDANIEL, BENNETT & GRIFFIN,
Defendants.

WILLIAM C. BOND,
Plaintiff-Appellee,

v. No. 02-1288

MCDANIEL, BENNETT & GRIFFIN,
Defendant-Appellant,

and

ADELBERG, RUDOW, DORF
& HENDLER, LLC;
KENNETH BLUM, SR.;
KENNETH BLUM, JR.;
DUDLEY F. B. HODGSON,
Defendants.

Appeals from the United States District Court
for the District of Maryland, at Baltimore.
Marvin J. Garbis, District Judge.
(CA-01-2600-MJG)

Argued: October 31, 2002
Decided: January 24, 2003
Entered: January 24, 2003

Before NIEMEYER, WILLIAMS, and MICHAEL, Circuit Judges.

Affirmed in part and vacated and remanded in part by published opinion. Judge Niemeyer wrote the opinion, in which Judge Williams and Judge Michael joined.

COUNSEL

ARGUED: Howard J. Schulman, SCHULMAN & KAUFMAN, L.L.C., Baltimore, Maryland, for Appellant. William Fitts Ryan, Jr., WHITEFORD, TAYLOR & PRESTON, L.L.P., Baltimore, Maryland; Andrew Radding, ADELBERG, RUDOW, DORF & HENDLER, L.L.C., Baltimore, Maryland, for Appellees. **ON BRIEF:** Amy E. Askew, WHITEFORD, TAYLOR & PRESTON, L.L.P., Baltimore, Maryland; J. Andrew McKinney, ADELBERG, RUDOW, DORF & HENDLER, L.L.C.,

Baltimore, Maryland; Gerard P. Martin, Thy C. Pham, MARTIN, SNYDER & BERNSTEIN, P.A., Baltimore, Maryland; Kathryn M. Goldman, JIRANEK, GOLDMAN & MINTON, L.L.C., Baltimore, Maryland, for Appellees.

OPINION

NIEMEYER, Circuit Judge:

On a motion for summary judgment filed in this copyright infringement action, the district court held that the defendants' copying of a copyrighted manuscript for introduction into evidence in a state-court child-custody proceeding constituted a "fair use" of the manuscript under the Copyright Act, 17 U.S.C. § 107, when the substance of the manuscript was relevant to the issues in the child-custody proceeding and the defendants' use of the manuscript was solely for its content and not for its mode of expression. The district court also awarded attorneys fees, under 17 U.S.C. § 505, to the prevailing *individual* defendants but not to the law-firm defendants because the law firms were represented by a member of the firm and thus were acting *pro se*.

For the reasons given in this opinion, we affirm the district court's summary judgment and its award of attorneys fees to the individual defendants, and we remand for reconsideration of the law-firm defendants' motion for attorneys fees.

I

In the child-custody case of *Slavin v. Slavin*, commenced in July 2000 and pending in the Circuit Court

for Baltimore City, Case No. 95249006/CE 201677, Alyson Slavin Bond sued her former husband, William Slavin, for exclusive custody of their three children. William Slavin filed a cross-petition for exclusive custody and, in support of his position, introduced into evidence an autobiographical manuscript written by Alyson's current husband, William Bond, to establish that the home of Alyson and William Bond would not be a suitable place for the three children. Bond's manuscript was entitled *Self-Portrait of a Patricide: How I Got Away with Murder*.

In June 1981, when William Bond, who was formerly known as William Rovtar, was 17, he beat his father to death with a hammer in his grandparents' garage in Bainbridge Township, Ohio. After Rovtar was arrested and detained in a juvenile detention facility in Ohio, he entered into a guilty-plea agreement in juvenile court with the result that in September 1981 he was transferred to the Sheppard & Enoch Pratt Hospital in Baltimore, Maryland, for psychological treatment. Rovtar was released in 1982, and after his release, he legally changed his name to William Bond. He remained in Maryland and thereafter became employed as a tennis instructor at a country club, a bicycle salesman, and a bodyguard, among other things.

In 1987, Bond began to write *Self-Portrait of a Patricide: How I Got Away with Murder*, "the true story of and by William Bond," which he hoped to market to publishers for profit. The manuscript describes in horrific detail how Bond planned and committed the murder of his father with a hammer, and how his dying father attempted to raise himself off the floor of the garage before Bond delivered the final blows to his neck and

head. It describes Bond wiping away his fingerprints, scrubbing the garage floor, cleaning blood, flesh, and bone from his clothes, and stuffing his father's dead body in his car's trunk. Most sinister of all, it depicts a remorseless individual who brags about fooling the police and the juvenile system to "get away scot-free" and even collecting, as planned, the money from his father's estate. Although verifiable facts of the murder are consistent with the details provided in the manuscript, Bond has now stated in an affidavit that the manuscript is "a highly fictionalized and stylized work," based on his "juvenile experience." Bond circulated his manuscript directly and through agents in order to find a publisher, asking for a seven-figure advance. His efforts, however, were unsuccessful. After some revisions, Bond also gave a copy of the manuscript to Norman Pessin, an attorney who had represented Bond in various unrelated matters, to help him get the manuscript published, but his efforts, too, failed. Although Pessin thereafter died, his widow retained a copy of the manuscript.

Bond met Alyson Slavin in early 1995, after Alyson was separated from her husband, William Slavin. Bond and Alyson continued to see each other until they married in May 2001. In 1996, shortly after Bond and Alyson met, Bond wrote a lengthy letter to Alyson's father, Kenneth Blum, Sr., indicating that he intended to marry Alyson and become the stepfather of her children. The letter offered an analysis of individual members of Blum's family and purported to offer "solutions" to correct perceived deficiencies in the Blum-Slavin extended family. In addition, the letter set forth an expansive financial plan, pursuant to which Bond demanded from Blum a dowry, a salary, establishment of an investment account, purchase of a studio apartment in

addition to a house, and a severance package should Bond's marriage with Alyson not work out. Bond stated to Blum, "You can pay me now or pay me later." In this letter, Bond also made reference to his personal history, stating that he "had a past," and that, although it was "none of [Blum's] business," it makes "interesting reading."

Blum not only found this letter very disconcerting, considering it to be an attempt to extort money from him, but he also became concerned for the safety of Alyson and her children. In June 2000, just before the state custody action was commenced, Blum hired a private investigator, Dudley F. B. Hodgson, to look into Bond's background. At their first meeting, Blum gave Hodgson an overview of his dealings with Bond and expressed his concern over both the safety of his grandchildren and Bond's effort to "shake him down" for money. Blum gave Hodgson a copy of the letter that Bond had sent him and told Hodgson that he had heard that Bond may have had some problems with his family involving violence in Ohio.

In the course of his investigation, Hodgson learned about the murder of Bond's father and contacted the Bainbridge, Ohio police department, obtaining copies of the police report and other documents relating to the homicide investigation. Hodgson reported these findings to Blum, and at Blum's request, Hodgson went to the home of Miriam Pessin, the widow of Norman Pessin, believing that Bond had also tried to "shake Pessin down" for money before he died. When Hodgson interviewed Miriam Pessin in April 2001 and asked her if she had any information that would be helpful in his investigation of Bond, she told Hodgson that she did have, stored in a

box, a loose-leaf copy of a manuscript that Bond authored. Mrs. Pessin stated that Bond had given a copy of the manuscript to her husband for him to read for the purposes of locating a publisher. She later testified that this box of materials was not part of Pessin's legal files, which he carefully kept separate, and that Bond had also given her portions of the manuscript to read. Not wanting to retain the manuscript in her home, Mrs. Pessin gave it to Hodgson. Hodgson made a copy of the manuscript and gave copies to Alyson's ex-husband, William Slavin, and the attorneys representing him in the state custody action. William Slavin's attorneys made the manuscript an exhibit during the deposition of Alyson in July 2001 and intended to make it a part of the custody litigation in the Circuit Court for Baltimore City, in which a hearing was scheduled for December 10, 2001. For the sole purpose of preventing further use of the manuscript in the proceedings before the Baltimore City Circuit Court, Bond registered a copy of his manuscript with the Copyright Office in August 2001.

Immediately after registering the manuscript, Bond commenced this action for copyright infringement, naming as defendants Blum, Blum's son, Hodgson, William Slavin, and Slavin's attorneys. He requested a preliminary and permanent injunction prohibiting the use of the manuscript by the defendants for any purpose and requiring the return of all existing copies.

At the hearing on Bond's motion for a preliminary injunction, the district court heard testimony from Alyson Bond, Blum, Hodgson, and Mrs. Pessin, among others. Following the hearing, the court found that Bond had written the manuscript and had delivered it to Pessin and others in an effort to get it published. The court

found that Pessin's efforts to get the book published were not "part of [Pessin's] legal practice, because he wasn't doing this as a lawyer." The court concluded that the document was not "a confidential document in any kind of privileged sense." In addition, the court found that Hodgson did not steal the document but was given the document by Pessin's wife.

On the merits of the copyright infringement issue, the court evaluated the defendants' defense of "fair use" by applying the four factors set forth in 17 U.S.C. § 107. The court concluded that (1) the purpose and character of the defendants' anticipated use of the manuscript was not one against which the Copyright Act sought to protect; (2) the nature of the manuscript did not weigh against the finding of a "fair use"; (3) the defendants were seeking to introduce the entire manuscript, which weighed against a finding of fair use; and (4) the use would have "absolutely zero" detrimental effect on the potential market for the copyrighted work and could, "in a perverse way," actually increase its market value. Based on these conclusions, the court held that the challenged use was a "fair use." The court thus denied Bond's motion for a preliminary injunction, and then, based on the undisputed facts, granted summary judgment in favor of the defendants on November 20, 2001.*

When Bond filed a motion to alter or amend the judgment, the district court denied the motion, finding that Bond was again "blurring the distinction between the copyright protection afforded the mode of expression in

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* Counsel for the parties state that at the custody hearing on December 10, 2001, in state court, William Slavin's attorneys in fact introduced the manuscript into evidence.

a written work and the ideas and facts in the public domain which are expressed in the work." The court observed that Bond had not established any likelihood that the defendants intended to utilize the manuscript in any way other than that deemed by the court to be a fair use, and that, in the event they tried to use it for other purposes, they would do so "at the risk of being sued as a wil[l]ful infringer."

Pursuant to motions filed by the defendants, the district court awarded attorneys fees to the individual defendants under 17 U.S.C. § 505, but not to the law-firm defendants because the law firms were representing themselves *pro se*. The court also denied the law-firm defendants' motions for sanctions against Bond pursuant to Federal Rule of Civil Procedure 11.

Bond filed an appeal from the district court's summary judgment entered on November 27, 2001, and the court's subsequent order awarding attorneys fees. The law-firm defendants cross-appealed from the district court's denial of their motions for attorneys fees and for Rule 11 sanctions.

II

Bond contends that the district court adopted a *per se* rule that use of copyrighted material as evidence in a legal proceeding is always a "fair use," "overriding" the analysis for finding "fair use" required by 17 U.S.C. § 107. Acknowledging that the court might be able to find the fair-use doctrine applicable to the use of copyrighted material as evidence, Bond maintains that the court erred in doing so in this case by not considering all of the statutorily prescribed factors.

The defendants note that the district court did in fact consider the factors set forth in § 107 and that the consideration of those factors correctly demonstrated that "the non-commercial use of the manuscript in the child custody litigation did not result in any commercial exploitation of the work or adversely affect its marketability."

The undisputed facts show that the defendants introduced a copy of Bond's copyrighted manuscript into evidence in a state child-custody proceeding to prove that Bond's household would not be a suitable place for the children of Bond's wife. The work, written by Bond and circulated by him in an effort to publish it, describes how Bond, when 17, planned and committed the murder of his father with a hammer, fooled the police about his mental state, used the juvenile system to obtain merely a "slap on the wrist," and recovered the proceeds of his father's estate, all without remorse. In the manuscript, he stated, "I wanted my father's money." The defendants made copies of the manuscript to use its content as evidence in the child-custody litigation, and there is no evidence of any intent to exploit the book's manner of expression for any purpose, commercial or otherwise. Indeed, there is no evidence in the record to indicate that the defendants' use of the manuscript was anything more than the presentation of evidence in a child-custody proceeding to prove the unsuitability of Bond's home as a place for children. Moreover, there is no evidence that this use adversely affected Bond's interests in the copyright.

Applying the four factors stated in 17 U.S.C. § 107, the district court held that the defendants' use of the work fell within the "fair use" exception established in 17 U.S.C. § 107, principally because the "[p]urpose and character of [the defendants'] use has nothing whatsoever to do with any interest that the copyright law was designed to protect. The copyright law was never designed to protect content as distinguished from mode of expression." The court also concluded that "the effect of the [defendants'] use on the potential market for value of the copyrighted work is absolutely zero."

We review the district court's summary judgment *de novo*, applying the same standard that the district court was required by law to apply for granting the motion for summary judgment. *Beverati v. Smith*, 120 F.3d 500, 503 (4th Cir. 1997).

The Copyright Act, enacted on the authority of Article I, § 8, of the Constitution, confers on creators of original works a limited monopoly in their works of authorship to advance an important public purpose. "It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). The reward to the owner is "a secondary consideration" that serves the primary public purpose of "induc[ing] release to the public of the products of [the author's or artist's] creative genius." *Id.* (quoting *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948)); *see also Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 546 (1985).

The copyright "monopoly" — i.e., the "bundle of exclusive rights . . . to publish, copy, and distribute" the work, *Harper & Row*, 471 U.S. at 546-47 — is limited and subject to a list of statutory exceptions, including the exception for fair use provided in 17 U.S.C. § 107. *See* 17 U.S.C. § 106; *Sony*, 464 U.S. at 447. Section 107 provides explicitly that "the fair use of a copyrighted work . . . is not an infringement of copyright."

The fair-use doctrine is a longstanding common-law principle, now codified in § 107, that was "traditionally defined as `a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent.'" *Harper & Row*, 471 U.S. at 549 (quoting H. Ball, *Law of Copyright and Literary Property* 260 (1944)). The reasonableness of a use is determined on a case-by-case basis applying an "equitable rule of reason analysis." *Sony*, 464 U.S. at 448; *see also Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577-78 (1994). To guide the determination of whether a particular use is a fair use, § 107 provides that a court must consider four factors among any others relevant:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107. These factors are "not meant to be exclusive," *Harper & Row*, 471 U.S. at 560, but rather "illustrative," representing "only general guidance about the sorts of copying that courts and Congress most commonly have found to be fair uses," *Campbell*, 510 U.S. at 577-78. Because a particular use must be examined for its reasonableness in determining whether it is a "fair use," any *per se* rule is inappropriate. *Id.* at 577 ("The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis"); *id.* at 585 ("The Court of Appeal's elevation of one sentence from *Sony* to a per se rule thus runs as much counter to *Sony* itself as to the long common-law tradition of fair usage adjudication"); *Sundeman v. Seajay Soc'y, Inc.*, 142 F.3d 194, 202 (4th Cir. 1998) (noting that fair use demands a case-by-case inquiry).

A fair-use analysis bears relevance only when a challenged use violates a right protected by the Copyright Act. But the statutorily protected rights are themselves limited in that a copyright does not secure an exclusive right to the use of facts, ideas, or other knowledge. Rather, a copyright gives an author exclusive rights only with respect to his manner of expression. *See, e.g., Baker v. Selden*, 101 U.S. 99, 102 (1879); *Superior Form Builders, Inc. v. Chase Taxidermy Supply Co.*, 74 F.3d 488, 492 (4th Cir. 1996) (noting that "the originality inherent in each author's expression is the essence of the proprietary interest protected"). In *Superior Form Builders*, we noted that even though the Copyright Act will protect even the minimal quantum of originality — "independent creation plus a modicum of creativity," *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991) — the public has an interest in retaining in the

public domain "the right to discover facts and exchange ideas freely. Thus, copyright protection does not extend to ideas or facts even if such facts were discovered as the product of long and hard work." *Superior Form Builders*, 74 F.3d at 492 (internal citation omitted).

With these general principles of copyright law in hand, we now turn to the question before us of whether the defendants' use of Bond's copyrighted manuscript as evidence in the child-custody proceeding was subject to the fair-use exception defined in § 107. To make that determination, we apply the four factors set forth in § 107.

A

The first § 107 factor directs the inquiry into the "purpose and character of the [defendants'] use, including whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. § 107(1). The use of a copyrighted work for a commercial purpose "tends to weigh against a finding" that the challenged use is a "fair use." *Harper & Row*, 471 U.S. at 562. The "crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." *Id.* If a challenged use of a copyrighted work is noncommercial, the party alleging infringement must demonstrate "either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work." *Sony*, 464 U.S. at 451.

Application of this factor weighs heavily against Bond's infringement claim. The defendants' use of Bond's copyrighted manuscript is not for any commercial purpose; the defendants are not seeking to exploit the copyrighted material without paying the customary price. Indeed, the defendants' use is indifferent to Bond's mode of expression. Rather, the narrow purpose of defendants' use of the manuscript is for the evidentiary value of its content insofar as it contains admissions that Bond may have made against his interest when he bragged about his conduct in murdering his father, in taking advantage of the juvenile justice system, and in benefiting from his father's estate. These are all facts relevant to the custody decision, and their use does not draw on Bond's mode of expression.

Because the challenged use is noncommercial, Bond must demonstrate that the use of the manuscript as evidence in the litigation would harm the potential market for his manuscript. Neither in his brief nor at oral argument has Bond been able to identify any harm or potential harm to his work against which the law of copyrights protects. The only harm that we can discern from his arguments is a claim that he has lost the right to control the release of a "private" or "confidential" document. But at oral argument, he conceded that the document was not confidential. Indeed, it is apparent that Bond has circulated the document in an effort to have it published. But more importantly, the protection of privacy is not a function of the copyright law. *See, e.g., New Era Publications Int'l APS v. Henry Holt & Co.*, 695 F. Supp. 1493, 1504-05 (S.D.N.Y. 1988) (Leval, J.). To the contrary, the copyright law offers a limited monopoly to encourage ultimate *public access* to the creative work of the author. If privacy is the essence of Bond's claim, then

his action must lie in some common-law right to privacy, not in the Copyright Act. *See, e.g., Lawrence v. A.S. Abell Co.*, 475 A.2d 448, 450-51 (Md. 1984).

B

We next consider the second factor, "the nature of the copyrighted work." 17 U.S.C. § 107(2). This factor focuses attention on the extent to which a work falls at the core of creative expression. *See Campbell*, 510 U.S. at 586. Thus, for example, a fictional work might be closer to the core of copyright than a factual work. *See, e.g., Stewart v. Abend*, 495 U.S. 207, 237-38 (1990).

That Bond's manuscript is unpublished and contains a stylized mode of expressing his feelings about historical facts weigh against a finding of fair use. *See Harper & Row*, 471 U.S. at 564. But, as *Campbell* instructs, we do not consider the § 107 factors "in isolation, one from another," but we weigh them together "in light of the purposes of copyright." 510 U.S. at 578. Where, as here, the use of the work is not related to its mode of expression but rather to its historical facts and there is no evidence that the use of Bond's manuscript in the state legal proceedings would adversely affect the potential market for the manuscript, one cannot say the incentive for creativity has been diminished in any sense. And because the societal benefit of having all relevant information presented in a judicial proceeding is an important one, it should be furthered if doing so would not unduly undermine the author's rights with regard to his creative work.

C

Under the third § 107 factor, we examine the "amount and substantiality of the portion used in relation to the copyrighted work as a whole." 17 U.S.C. § 107(3). As a general matter, as the amount of the copyrighted material that is used increases, the likelihood that the use will constitute a "fair use" decreases. But this is an imperfect generalization. *Compare Harper & Row*, 471 U.S. 569 (holding that publication of only some 300 words from unpublished memoirs of President Ford was not a fair use given the quality of the quoted language), *with Campbell*, 510 U.S. at 594 (holding that even qualitatively substantial copying in a parodical song is fair use when such copying serves the necessary function of "conjuring up" the original song to advance the parody). "The extent of permissible copying varies with the purpose and character of the use." *Campbell*, 510 U.S. at 586-87.

It is conceded that the defendants' challenged use of the manuscript in the state-court proceeding involved all, or nearly all, of the copyrighted work. Its use, however, was not for its expressive content, but rather for its allegedly factual content. The sole purpose and intent of introducing Bond's manuscript was to obtain admissions of fact against his interest in an effort to prove that his home would not be a suitable place for custody of children. The use of the copyrighted material in this context, even the entire manuscript, does not undermine the protections granted by the Act but only serves the important societal interest in having evidence before the factfinder. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994) ("We have often recognized the monopoly privileges that Congress has authorized, while `intended to motivate the creative activity of authors and inventors

by the provision of a special reward,' are limited in nature and must ultimately serve the public good"). Because the manuscript was not used to undermine any right conferred by the Copyright Act, Bond can derive little benefit from this factor in the context of this case.

D

Finally, we consider the effect of the defendants' use of Bond's copyrighted manuscript "upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107(4). This factor is "undoubtedly the single most important element of fair use." *Harper & Row*, 471 U.S. at 566. This is so because it touches most closely upon the author's ability to capture the fruits of his labor and hence his incentive to create. Under this core inquiry, we determine whether the defendants' introduction of the manuscript in evidence would materially impair the marketability of the work and whether it would act as a market substitute for it.

On this factor, there is no evidence that the admission into evidence of Bond's manuscript would adversely affect its marketability. Indeed, the district court made the observation: "Ironically, if anything, [the defendants' use] increases the value of the work in a perverse way, but it certainly doesn't decrease it."

E

In sum, we conclude that the district court did not err in concluding that the defendants' use of the manuscript as evidence in the state-court proceeding fell within the scope of fair use authorized by § 107 of the

Copyright Act. To the contrary, we agree with the district court when it stated:

> Purpose and character of [the defendants'] use has nothing whatsoever to do with any interest that the copyright law was designed to protect. The copyright law was never designed to protect content as distinguished from mode of expression.
>
> * * *
>
> It was certainly never intended to utilize, to keep from the public the ability to state the facts in a document as compared to the mode of expression.
>
> * * *
>
> [Moreover], the effect of [defendants'] use on the potential market for value of the copyrighted work is absolutely zero.

III

Bond also contends that the district court erred in awarding attorneys fees to the individual defendants as prevailing parties, under 17 U.S.C. § 505. The district court awarded $6,675.45 each to the defendants Dudley Hodgson, Kenneth Blum, Jr., and Kenneth Blum, Sr., and $8,699.70 to William Slavin.

Bond does not contest the amount of the awards, but he argues that the district court's findings on the factors relevant to an award of attorneys fees were not

justified. He argues that he was only seeking to protect his rights under the Copyright Act and that his rights should not be chilled by an assessment of attorneys fees. He argues expansively that the question of whether the introduction of a copyrighted work into evidence was a fair use is a close question, particularly when there are no controlling authorities on point.

We review the district court's award of attorneys fees under 17 U.S.C. § 505 for abuse of discretion, reversing subsidiary factual findings only if they are clearly erroneous. *Diamond Star Bldg. Corp. v. Sussex Co. Builders, Inc.*, 30 F.3d 503, 506 (4th Cir. 1994).

The Copyright Act provides:

> [T]he court in its discretion may allow the recovery of full costs by or against any party. . . . Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

17 U.S.C. § 505. To determine whether an award of attorneys fees should be made to a party under § 505, we have articulated four factors for consideration: "(1) the motivation of the parties, (2) the objective reasonableness of the legal and factual positions advanced, (3) the need in particular circumstances to advance considerations of compensation and deterrence, and (4) any other relevant factor presented." *Diamond Star*, 30 F.3d at 505 (quoting *Rosciszewski v. Arete Assocs., Inc.*, 1 F.3d 225, 234 (4th Cir. 1993) (internal quotation marks omitted)).

In applying these factors to the circumstances before it, the district court found that Bond's motivation in bringing his copyright infringement action was "to block potentially relevant evidence from being presented" in the child custody proceeding. In essence, the court stated that Bond misused the Copyright Act and that he was motivated by a desire to suppress the underlying facts of his copyrighted work rather than to safeguard its creative expression. Assessing the reasonableness of the legal positions advanced by Bond, the court concluded that the fair-use question presented by Bond's complaint was "not a close one" and that Bond's position was "frivolous," although the court recognized that frivolousness was not essential to an award of attorneys fees. The court concluded that it was unreasonable for Bond to use a copyright infringement action to attempt to bar introduction of facts disclosed in the work as admissions against his interest, particularly when the information was relevant to child-custody issues. Finally, the court stated that Bond and others in a position similar to him "should be deterred from bringing meritless actions."

We conclude that the district court, in reaching these conclusions, did not clearly err in its factfinding and, in applying the *Rosciszewski* factors to award attorneys fees to the prevailing individual defendants, did not abuse its discretion.

IV

The two law-firm defendants — McDaniel, Bennett & Griffin and Adelberg, Rudow, Dorf & Hendler, LLC — also sought attorneys fees under 17 U.S.C. § 505, but the district court denied them because it concluded that the

firms were acting *pro se* and therefore were not entitled to fees. The law firms cross-appealed, arguing that the district court erred in applying to them the *pro se* exception, as stated in *Kay v. Ehrler*, 499 U.S. 432 (1991) (holding that an attorney representing himself is ineligible for attorneys fees under 42 U.S.C. § 1988).

Because of the absence of judicial precedents and in view of the insight provided by our decision in *Doe v. Board of Education of Baltimore County*, 165 F.3d 260 (4th Cir. 1998) (denying statutory fees to an attorney-parent of a child with a disability who was a prevailing party under 20 U.S.C. § 1415(i)(3)(B)), the district court believed that it could not award fees under 17 U.S.C. § 505 to a prevailing law firm when members of that law firm represent the firm. The district court held conditionally that if it had been given "discretion to award counsel fees to the law firm defendants, it would do so," but it would have awarded "substantially less than the amount claimed because . . . had there been independent counsel being paid by the law firm Defendants, the matter would have been handled at far less cost than is sought from the Plaintiff."

The law firms contend that the district court erred in concluding that the law firms were proceeding *pro se* and that the cases of *Kay* and *Doe* preclude an award of fees to them under § 505. They state that they are "legal entities represented by attorneys," albeit attorneys within the firm. They argue that the Supreme Court's statement in *Kay* that "an organization is not comparable to a *pro se* litigant" is dispositive on this issue. *Kay*, 499 U.S. at 436 n.7. They argue additionally that Local Rule 101.1(a) of the District of Maryland states that "[o]nly individuals may represent themselves." They maintain that a law

firm using members to represent the firm is more analogous to a State or a corporation represented by its own in-house counsel. In each of the situations, they note, the attorney-client relationship is created between the organization and the attorney, just as it was between the law firms and the members representing them.

This is an issue of first impression in our circuit, but its resolution may readily be derived from the Supreme Court's decision in *Kay* and our decision in *Doe*.

The principle that a *pro se* litigant who is *not* a lawyer is not entitled to attorneys fees authorized by a fee-shifting statute is not disputed. *See, e.g., Gonzales v. Kangas*, 814 F.2d 1411 (9th Cir. 1987); *Smith v. DeBartoli*, 769 F.2d 451 (7th Cir. 1985); *Owens-El v. Robinson*, 694 F.2d 941 (3d Cir. 1982). The question more analogous to the facts before us — whether a *pro se* litigant who is *also* an attorney would be entitled to such fees — was addressed by the Supreme Court in *Kay*. In *Kay*, the Court held that a plaintiff who was also an attorney and who prevailed in a civil rights action was nonetheless not entitled to fees under 42 U.S.C. § 1988(b), which authorizes attorneys fees to the prevailing party, notwithstanding the fact that the attorney "obviously handled his professional responsibilities . . . in a competent manner." 499 U.S. at 435. The Supreme Court rested its conclusion on three principles. First, as a textual matter, it concluded that an "attorney," whose fees would be reimbursable under § 1988, "assumes an agency relationship, and it seems likely that Congress contemplated an attorney-client relationship as a predicate for an award under § 1988." *Id.* at 436. Second, the Court focused on the purpose of fee-shifting statutes "to enable potential plaintiffs to obtain the assistance of

competent counsel in vindicating their rights." *Id.* And third, an award of fees to only those litigants who have retained independent counsel ensures "the effective prosecution of meritorious claims." *Id.* at 437. Explaining this more fully, the Court stated:

> Even a skilled lawyer who represents himself is at a disadvantage in contested litigation. Ethical considerations may make it inappropriate for him to appear as a witness. He is deprived of the judgement of an independent third party in framing the theory of the case, evaluating alternative methods of presenting the evidence, cross-examining hostile witnesses, formulating legal arguments, and in making sure that reason, rather than emotion, dictates the proper tactical response to unforeseen developments in the courtroom. The adage that "a lawyer who represents himself has a fool for a client" is the product of years of experience by seasoned litigators.

Id. at 437-38 (footnote omitted).

In *Doe*, we applied the principles of *Kay* to a fee-shifting provision in the Individual with Disabilities Education Act ("IDEA"), denying a parent, who was also an attorney, a right to collect fees under the statute for his representation of his child. 165 F.3d at 265. Even though a parent who was also an attorney was distinct from and therefore an agent for the prevailing child, who would otherwise be entitled to fees under IDEA, 20 U.S.C. § 1415(i)(3)(B), we concluded that "[l]ike attorneys

appearing *pro se*, attorney-parents are generally incapable of exercising sufficient independent judgment on behalf of their children to ensure that `reason, rather than emotion' will dictate the conduct of the litigation." *Id.* at 263 (quoting *Kay*, 499 U.S. at 437). Because a parent-attorney's representation of his child was akin to *pro se* representation, we employed the rationale of *Kay* to find that the parent-attorney representation of a child in an IDEA case fell within the "special circumstances" exception barring fees where such an award would be unjust. *See Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983).

But the principles of *Kay* and *Doe*, which were applied to deny a prevailing party attorneys fees under fee-shifting statutes, do not apply in circumstances where entities represent themselves through in-house or *pro bono* counsel. In *Kay*, the Supreme Court explained the distinction: "[A]n organization is not comparable to a *pro se* litigant because the organization is always represented by counsel, whether in-house or *pro bono*, and thus, there is always an attorney-client relationship." 499 U.S. at 436 n.7. When a member of an entitywho is also an attorney represents the entity, he is in an attorney-client relationship with the entity and, even though interested in the affairs of the entity, he would not be so emotionally involved in the issues of the case so as to distort the rationality and competence that comes from independent representation. Accordingly, a State's own attorneys representing the State may be awarded attorneys fees under a fee-shifting statute. *See Wisconsin v. Hotline Indus., Inc.*, 236 F.3d 363 (7th Cir. 2000). And in-house counsel representing the corporation for whom they work may also be awarded attorneys fees. *See Textor v. Bd. of Regents of Northern Ill. Univ.*, 711 F.2d 1387, 1396 (7th Cir. 1983) ("Defendants chose to hire in-house

counsel because that was the most efficient means of handling a large amount of legal work. . . . [F]or every hour in-house counsel spent on this case, defendants lost an hour of legal services that could have been spent on other matters").

Though representation of a law firm by one of its members presents an increased risk of emotional involvement and loss of independence, the law firm still remains a business and professional entity distinct from its members, and the member representing the firm as an entity represents the firm's distinct interests in the agency relationship inherent in the attorney-client relationship. Although a given representation of a law firm by one or more of its members could suffer from a lack of independence, there is no indication in this case of a relationship that tended to distort independent judgment, as existed in *Doe*.

Because the district court indicated that it was inclined to award the law-firm defendants fees, although not all the fees requested, and would have done so but for the *pro se* prohibition, we now remand this case to authorize, but not require, the district court to award § 505 fees if it determines, in its discretion, to do so.

V

The law-firm defendants also contend that the district court erred in denying their motion for sanctions under Federal Rule of Civil Procedure 11. In denying their motion, the district court stated, "It appears well settled that unless a Rule 11 motion is filed in accordance with the 21 day `safe harbor' warning provision, it cannot be granted." The court, however, did not have the benefit

of our decision in *Rector v. Approved Fed. Savings Bank*, 265 F.3d 248 (4th Cir. 2001), which had been decided only shortly before the court ruled. In *Rector*, we held that the safe harbor provision was not jurisdictional and could be waived if not properly asserted.

Without expressing any opinion on how the motion for sanctions should be decided, we remand this issue to the district court for further consideration of the motion, taking into account our decision in *Rector*.

Accordingly, the judgment of the district court is

AFFIRMED IN PART AND VACATED AND REMANDED IN PART.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILLIAM C. BOND, *
Plaintiff *

vs. *

KENNETH BLUM, SR., *et al.*, *
Defendants *

CA-MJG-01-2660

Entered: January 27, 2002

On Motion to Alter or Amend Judgment and
Amended Motion to Alter or Amend Judgment

MEMORANDUM AND ORDER

The Court has before it Plaintiff's Motion to Alter or Amend Judgment, Plaintiff's Amended Motion to Alter or Amend Judgment and the materials submitted relating thereto. The Court finds that a hearing is unnecessary.

Plaintiff is determined to blur the distinction between the copyright protection afforded the mode of expression in a written work and the ideas and facts in the public domain which are expressed in the work. As noted in the Court's oral opinion, a party to litigation is making fair use of a document protected by copyright when presenting the document as relevant evidence in a

legal proceeding. The Defendants did not violate any copyright interest the Plaintiff had in the manuscript at issue by their use of the document in the custody proceeding or in the instant case.

Plaintiff did not establish prior to Judgment, and has not now established, any likelihood that Defendants will utilize the manuscript other than in a manner held by this Court to constitute fair use.

It is, of course, theoretically possible that the Defendants, or anyone else for that matter, could seek to use the manuscript other than in the custody proceedings[1]. Should any Defendant do so, that Defendant would do so at the risk of being sued as a wilful infringer who could be liable for substantial statutory damages. Of course, in any such lawsuit certain serious issues not here addressed, for example the adequacy of the copyright registration, would have to be resolved.

Whatever the future may hold in regard to the parties to the instant case, the Court finds no reason to believe that the Defendants intend to, or would have any reason to, make any use, other than fair use in litigation, of the manuscript at issue.

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[1] Including, of course, any appeals and related judicial proceedings.

For the foregoing reasons:

1. Plaintiff's Motion to Alter or Amend Judgment is DENIED.

2. Plaintiff's Amended Motion to Alter or Amend Judgment is DENIED.

SO ORDERED this 27th day of December, 2001.

/s/_____
Marvin J. Garbis
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

WILLIAM C. BOND,
Plaintiff,

v.

KENNETH BLUM, SR., ET AL.
Defendants.

Baltimore, Maryland
Civil Action No. MJG 01-2600
Entered: November 20, 2001

REPORTER'S OFFICIAL TRANSCRIPT
OF PROCEEDINGS
(TR. 363-367)

BEFORE:

THE HONORABLE MARVIN J. GARBIS

OPINION

THE COURT: All right. Let me get to the bottom line. I understand there's a lot at stake here, and we have, you know, a dispute that's far beyond this copyright dispute, but I've got to deal with this in a copyright matter.

I think that the facts are -- the relevant facts are really not debatable, and I'm going to just -- I'm doing this off the top of my head. If somebody wants to

appeal, I'm going to have to write it up. I think it's just not very complex.

There was some incident in Mr. Bond's life in which he was accused and pleaded to a crime in Ohio. He was represented by Gerald Messerman, an extremely fine lawyer, with whom I had the privilege of going to law school and actually practiced in law with Mr. Messerman, so he was certainly represented by as good a lawyer as you'll find in Ohio or wherever else, present company perhaps excluded and perhaps not.

Whatever it was, he came to Baltimore. This relationship started with a person who's now Mrs. Bond. There's a custody battle, all of which we get involved with.

He had written up a manuscript, which was a version, but be it fiction or real or something in between is not here to be determined, because in fact he wrote it or wrote most of it, so that's not an issue.

He went to a lawyer named Mr. Pessin and some others, and he tried to get it published. It's obvious, nobody's making any serious contention Mr. Pessin was acting in part as a literary agent, was sending it out to people. There's letters.

The one letter that he wrote to one person, I mean, I haven't heard the arguments, but I'll wait to hear the arguments he was talking about his participating together with other people in the promotion of a book. He was obviously going to be a partner in the book. That's fine. Whatever it works out, works out.

The book ends up as -- and on the facts it end up in Mr. Pessin's house. It's not part of his legal practice, because he wasn't doing this as a lawyer, and the copy is either going to be thrown out, but it's given to Mr. Hodgson, and we can make some debate as to who owns that copy, but that's really different from analyzing the copyright.

This is not a confidential document in any kind of privileged sense. And, in any event, Mr. Hodgson did not steal it. Mr. Hodgson got the document from somebody who had control of that copy, who appeared to be legally entitled to do so, and gave it to him. I'm not casting any stones at him.

The defendants got it, and with regard to a judicial proceeding, we get into 107. Also it was given to the police. One can make an argument, but an argument can be made with regard to whether giving it to the police is the equivalent of using it in a judicial proceeding. I say that that's not relevant for a lot of reasons.

The primary reason is that I'm not here concerned with what I am going to do with suppressing the police's acquisition of this document on copyright grounds, but I would find that even giving it to the police is the same thing. We look at 107. There's a body of precedence that says that the use of a work, even the entire work, in litigation, is fair use.

Yes, we have to look at all four aspects of it. I look at the purpose and character of the use. Purpose and character of this use has nothing whatsoever to do with any interest that the copyright law was designed to

protect. The copyright law was never designed to protect content as distinguished from mode of expression.

It was never intended to protect what is said as compared to how you say it. It was certainly never intended to utilize, to keep from the public the ability to state the facts in a document as compared to the mode of expression.

The purpose and the character of the use here has nothing to do with the mode of expression. It has to do with the content.

So the nature of the copyrighted work is a copyrightable manuscript, and I don't see where that cuts it. It's a perfectly fine manuscript.

The amount, substantiality of the portion used in relation to the copyright work as a whole is entirely used as a whole, which would be the most positive factor for the plaintiff, but the effect of the use on the potential market for value of the copyrighted work is absolutely zero.

Ironically, if anything, it increases the value of the work in a perverse way, but it certainly doesn't decrease it. I find very persuasive the cases without exception, without meaningful exception, that you can use a copyrighted document in evidence, and that's fair use.

So with that, I think that's where we are. And I think it makes life simple. I'm going to deny the preliminary injunction. I'm going to grant summary judgment to all the defendants without costs.

But, again, if somebody -- you know, if you want to appeal or want to have further proceedings in this case, you're free to file for reconsideration on the summary judgment.

I'm not here to rush things along, but I think I've got the key point in this case, and everything else is just churning. With that, I think we can adjourn.

/s/_____
Marvin J. Garbis
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WILLIAM C. BOND, *
Plaintiff-Appellant *
v. *
KENNETH BLUM, SR.; *
KENNETH BLUM, JR.; *
DUDLEY F. B. HODGSON; *
McDANIEL, BENNETT & GRIFFIN; *
ADELBERT, RUDOW, DORF & *
HENDLER, LLC; *
CHRISTOPHER W. NICHOLSON; *
WILLIAM SLAVIN, *
Defendants-Appellees *
* * * * * * *
WILLIAM C. BOND, *
Plaintiff-Appellee *
v. *
ADELBERT, RUDOW, DORF & *
HENDLER, LLC, *
Defendant-Appellant *
and *
KENNETH BLUM, SR.; *
KENNETH BLUM, JR.; *
DUDLEY F. B. HODGSON; *
McDANIEL, BENNETT & GRIFFIN, *
Defendants *
* * * * * * *
WILLIAM C. BOND, *
Plaintiff-Appellant *
v. *
ADELBERT, RUDOW, DORF & *
HENDLER, LLC, *
Defendant-Appellees *

and *
KENNETH BLUM, SR; *
KENNETH BLUM, JR.; *
DUDLEY F. B. HODGSON; *
McDANIEL, BENNETT & GRIFFIN, *
Defendants *
* * * * * * *
WILLIAM C. BOND, *
Plaintiff-Appellee *
v. *
McDANIEL, BENNETT & GRIFFIN, *
Defendant-Appellant *
and *
ADELBERT, RUDOW, DORF & *
HENDLER, LLC; *
KENNETH BLUM, SR; *
KENNETH BLUM, JR.; *
DUDLEY F. B. HODGSON, *
Defendants *

No. 02-1139
CA 01-2600-MJG

No. 02-1219
CA-01-2600-MJG

No. 02-1231
CA-01-2600-MJG

No. 02-1288
CA-01-2600-MJG

Filed: February 26, 2003
Entered: February 26, 2003

On Petition for Rehearing and
Rehearing En Banc

The Appellant/Cross-Appellee's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court

/s/ Patricia S. Connor

17 U.S.C. § 106. Exclusive rights in copyrighted works

Subject to sections 107 through 121, the owner of a copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 501. Infringement of copyright

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122, or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a). As used in this subsection, the term "anyone" includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.

(b) The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it. The court may require such owner to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright, and shall require that such notice be served upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall permit the intervention, of any person having or claiming an interest in the copyright.

(c) For any secondary transmission by a cable system that embodies a performance or a display of a work which is actionable as an act of infringement under subsection (c) of section 111, a television broadcast station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that television station.

(d) For any secondary transmission by a cable system that is actionable as an act of infringement pursuant to section 111(c)(3), the following shall also have standing to sue: (i) the primary transmitter whose transmission has been altered by the cable system; and (ii) any broadcast station within whose local service area the secondary transmission occurs.

(e) With respect to any secondary transmission that is made by a satellite carrier of a performance or display of a work embodied in a primary transmission and is actionable as an act of infringement under section 119(a)(5), a network station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that station.

(f) (1) With respect to any secondary transmission that is made by a satellite carrier of a performance or display of a work embodied in a primary transmission and is actionable as an act of infringement under section 122, a television broadcast station holding a copyright or other license to transmit or perform the same version of that

work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local market of that station.

(2) A television broadcast station may file a civil action against any satellite carrier that has refused to carry television broadcast signals, as required under section 122(a)(2), to enforce that television broadcast station's rights under section 338(a) of the Communications Act of 1934.

17 U.S.C. § 502. Remedies for infringement: Injunctions

(a) Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of section 1498 of title 28, grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.

(b) Any such injunction may be served anywhere in the United States on the person enjoined; it shall be operative throughout the United States and shall be enforceable, by proceedings in contempt or otherwise, by any United States court having jurisdiction of that person. The clerk of the court granting the injunction shall, when requested by any other court in which enforcement of the injunction is sought, transmit promptly to the other court a certified copy of all the papers in the case on file in such clerk's office.

17 U.S.C. § 503. Remedies for infringement: Impounding and disposition of infringing articles

(a) At any time while an action under this title is pending, the court may order the impounding, on such terms as it may deem reasonable, of all copies or phonorecords claimed to have been made or used in violation of the copyright owner's exclusive rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced.

(b) As part of a final judgment or decree, the court may order the destruction or other reasonable disposition of all copies or phonorecords found to have been made or used in violation of the copyright owner's exclusive rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced.

No. 02-1757

In The
Supreme Court of the United States

WILLIAM C. BOND,
Petitioner,

v.

KENNETH BLUM, SR.; KENNETH BLUM, JR.;
DUDLEY F. B. HODGSON;
MCDANIEL, BENNETT & GRIFFIN;
ADELBERG, RUDOW, DORF & HENDLER, LLC;
WILLIAM SLAVIN,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether The Fourth Circuit Properly Affirmed The Grant Of Summary Judgment In Favor Of Respondents On The Ground That The Non-Commercial Use Of An Autobiographical Work As Evidence In A Judicial Child Custody Proceeding To Prove That The Author's Household Was Not A Suitable Home For The Sole Custody Of Minor Children Constituted "Fair Use" Within The Meaning Of 17 U.S.C. § 107.

LIST OF PARTIES TO THE PROCEEDING IN THE COURT BELOW

The named petitioner is identified in the Petition for Writ of Certiorari.

The Respondents are individuals Kenneth Blum, Sr., Kenneth Blum Jr., Dudley F.B. Hodgson and William Slavin, as well as the law firms Adelberg, Rudow, Dorf & Hendler, LLC and McDaniel, Bennett & Griffin (collectively referred to as "Respondents").

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents respectfully submit the following disclosure statement:

Respondents state there are no parent or subsidiary companies to be listed, and there are no parent or publicly held corporations having a direct financial interest in the outcome of the litigation.

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COUNTER-STATEMENT OF THE CASE

Petitioner, William C. Bond (hereafter "Petitioner" or "Bond"), conveniently neglects several significant points in his rendition of this case's history. The autobiographical manuscript at issue in this case, authored by Petitioner and entitled *Self-Portrait of a Patricide: How I Got Away With Murder*, describes how Petitioner carried out a cold-blooded plot to kill his father by beating him to death with a hammer. The manuscript reveals that Petitioner felt no remorse for his crime, and then boasts how he got away with the murder by entering into a plea bargain for temporary insanity for which he was institutionalized for psychiatric treatment and later released. While Petitioner now characterizes his manuscript as a "fictionalized" work, it is undisputed that he murdered his father and, as stated by the Fourth Circuit, "verifiable facts of the murder are consistent with the details provided in the manuscript." Petitioner's Appendix at 6a.[1]

Petitioner's presentation of the underlying facts and his related failure to advise the Court completely and accurately of the contextual circumstances regarding the non-commercial use of the manuscript in the child custody proceeding is both misleading and disturbing. While Petitioner acknowledges that the manuscript was used as evidence in a child custody proceeding involving his wife, Alyson, and her former husband, Petitioner emphasizes that he "was not a party to those proceedings," (Pet. at 3), thereby

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[1] All references to the Petitioner's Appendix shall be hereinafter cited as "Pet. App. _____."

patently seeking to create a misleading impression that its use in the judicial proceeding was somehow inappropriate. In so doing, Petitioner fails to mention that he and Alyson lived together in the same house, that Alyson was seeking sole custody of the minor children and that the manuscript was used for the purpose of providing the custody court with information material to its determination as to whether such a sole custody arrangement was in the best interest of the children.

As found by the Fourth Circuit, which reviewed the district court's summary judgment *de novo*, "[t]he undisputed facts show that the defendants introduced a copy of Bond's copyrighted manuscript into evidence in a state child-custody proceeding to prove that Bond's household would not be a suitable place for the children of Bond's wife." Pet. App. 11a.

In its *de novo* review and affirmance of the district court's decision on the fair use issue, the Fourth Circuit also emphasized that "there is no evidence that this use adversely affected Bond's interest in the copyright." Pet. App. 11a. Additionally, the appellate court stated that, "there is no evidence in the record to indicate that defendants' use of the manuscript was anything more than the presentation of evidence in a child custody proceeding to prove the unsuitability of Bond's [i.e. Petitioner's] home as a place for the children." Pet. App. 11a. Moreover, as the Fourth Circuit concluded, and Petitioner has admitted, Petitioner registered a copy of the manuscript with the Copyright Office "[f]or the sole purpose of preventing further use of the manuscript in the proceedings before the Baltimore City Circuit Court." Pet. App. 8a. Thus, the district court found that "Bond misused the

Copyright Act and that he was motivated by a desire to suppress the underlying facts of his copyrighted work rather than safeguard its creative expression." Pet. App. 22a. Furthermore, in awarding attorneys' fees pursuant to 17 U.S.C. § 505 to Respondents,[2] and while recognizing that frivolousness is not essential to an award of fees, the district court concluded that the fair use question presented by Petitioner's complaint was "not a close one," that his position was "frivolous" and that Petitioner "and others in a position similar to his, should be deterred from bringing meritless actions." Pet. App. 22a. In affirming the district court's attorney fee award, the court of appeals concluded that the district court did not abuse its discretion in reaching these conclusions. Pet. App. 22a.

SUMMARY OF ARGUMENT

Petitioner misstates the holding and analysis of the Fourth Circuit. Contrary to Petitioner's characterization of the Fourth Circuit's decision, the court engaged in a proper analysis under 17 U.S.C. § 107 and did not create a *per se* rule. Moreover, the Fourth Circuit correctly concluded that because the use of the manuscript was noncommercial, Petitioner's failure to present evidence that Respondents' use

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[2] Initially, the district court believed it lacked authority to award fees to the law firm defendants. The law firm defendants appealed this ruling to the Fourth Circuit, which in turn held that the court had such authority. On remand, the district court awarded attorneys' fees under § 505 to the law firm defendants. On May 27, 2003, Bond filed a Notice of Appeal of the district court's award of fees to the law firm defendants.

would harm its potential market was properly considered by the lower courts in its fair use analysis.

THE WRIT SHOULD BE DENIED BECAUSE THE LOWER COURTS CONDUCTED A PROPER ANALYSIS OF THE § 107 FACTORS AND THEIR ANALYSIS IS CONSISTENT WITH THE RULINGS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEALS.

In asking this Court to review this matter, Petitioner suggests that the Fourth Circuit's decision is a "radical departure from and conflicts with this Court's" prior rulings in two respects. Petition at page 5.[3] First, Petitioner contends that the Fourth Circuit did not consider the four, non-exclusive factors stated in 17 U.S.C. § 107, but rather adopted a blanket, *per se* rule that the use of a copyrighted work in litigation always constitutes fair use. Pet. at 5. Second, Petitioner suggests that the lower appellate decision conflicts with this Court's decision in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), maintaining that *Campbell* prohibits the grant of summary judgment on a fair use question where "there is no evidence in the record concerning the effect of the use on the potential market for or value of the copyrighted work" and where, as here, the challenged use is non-commercial. Pet. at 5.

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[3] All references to the Petition shall be hereinafter cited as "Pet. at _____."

Petitioner's suggestions are frivolous.[4]

A simple turn to the text of the Fourth Circuit's opinion demonstrates that the appeals court considered and assessed each of the four factors set forth in § 107. Indeed, in turning to the question of whether use of the manuscript as evidence in the child custody proceeding was subject to the fair use exception, the Fourth Circuit expressly stated, "[t]o make that determination, we apply the four factors set forth in § 107" (Pet. App 15a), and then went on to assess each of these factors in separate sections of its opinion lettered "A" through "D." Pet. App. 15a- 19a. Simply put, the Court did not adopt any *per se* rule. Petitioner's related suggestion that the Fourth Circuit "confined its analysis to one relevant factor" (Pet. at 7) is also belied by the court's opinion. Moreover, his attempt to analogize the evidentiary use of the manuscript to the situation in *Harper & Row Publishers, Inc. v. Nation Enterprises,* 471 U.S. 539 (1985), where

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[4] It should also be noted that Petitioner's presentation of the questions presented does not fairly reflect the nature of the lower court's ruling or the noncommercial nature of the challenged use. Contrary to Petitioner's characterization of the first question he presents, the appeals court did not adopt a *per se* rule. Rather, it applied the non-exclusive four factor analysis set forth in § 107 to the undisputed facts of this case in reaching a fact, case specific decision. Petitioner's characterization of his second question is also potentially misleading because it fails to incorporate the undisputed *noncommercial* nature of the subject use- - a factor that has a direct impact on resolution of the general issue of whether a district court may grant summary judgment on the basis of fair use when there is no evidence of market harm.

Nation magazine wrongfully published without authorization and without compensation former President Ford's unpublished memoirs before they were lawfully published by *Time* magazine, is preposterous.

Petitioner's suggestion that the Fourth Circuit's decision conflicts with this Court's articulation of a proper fair use analysis in *Campbell* is also misplaced.

In *Campbell,* the alleged infringer created and sold approximately 250,000 copies of a commercial parody of the famous song, "Oh, Pretty Woman," twenty five years after the writing and copyright registration of the initial song, despite the fact that the infringer had been denied permission to use the lyrics after offering to pay a license fee for such permission. The district court granted summary judgment for the alleged infringer. The court of appeals reversed the district court's finding that the commercial parody was fair use, believing the lower court "had put too little emphasis on [this Court's statement in *Sony*[5]] 'every commercial use... is presumptively... unfair.'" 510 U.S. at 574. This Court, in turn, reversed the appeals court, noting that the appellate court "ostensibly" applied a presumption and confined its treatment of the fair use analysis to the commercial nature of the use. *Id.* at 583-84.

In reversing the court of appeals' conclusion that the commercial nature of the parody rendered it presumptively unfair, the Court's *Campbell* decision advised that "*Sony* itself called for no hard evidentiary presumption," and that the "court of appeals' elevation

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5 *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

much counter to *Sony* itself as to the long common law tradition of fair use adjudication." *Id.* at 584-85. Here, by contrast, the Fourth Circuit did not confine its fair use analysis to one factor, did not adopt any *per se* rule, and did not simply rule that the noncommercial nature of the evidentiary use of the manuscript was by itself (without regard to other factors) the sole dispositive factor for its fair use finding. Rather, as this Court instructed in *Campbell*, the court of appeals employed a "case-by-case analysis," and explored all four of the statutory factors, weighing the results together in light of the purposes of copyright. *Id.* at 577. In so doing, the court of appeals followed the analytical principles outlined by this Court in the *Sony* and *Campbell* decisions.

Petitioner also suggests that the rulings of the lower courts conflict with *Campbell* because "summary judgment cannot be granted on the ground of fair use where there is no evidence concerning the effect of the use on the potential market for or value of the copyrighted work." Pet. at 5. Petitioner's generalized suggestion is wrong. The question of which party bears the burden of proof as to market effect in noncommercial use cases was considered by this Court twenty years ago in *Sony*. At that time, the Court instructed that where the challenged use of a copyrighted work is noncommercial, the party alleging infringement [i.e. the Petitioner here] must demonstrate "either that the prohibited use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work." 464 U.S. at 452.

The Fourth Circuit correctly followed *Sony's* simple instruction in this case, stating that "[b]ecause the challenged use is noncommercial, Bond [i.e. Petitioner] must demonstrate that the use of the manuscript as evidence in the litigation would harm the potential market for his manuscript." Pet. App. 16a. He did not do so. Petitioner's present suggestion that this long-standing principle was "rejected" (Pet. at 14) by this Court ten years after *Sony* in the 1994 *Campbell* decision (which concerned commercial use) is simply not supported by the *Campbell* decision.

The *Campbell* opinion commented that a silent record on the effect of the parodic song's commercial use upon the potential market for a nonparody, rap version of "Oh, Pretty Woman" would disentitle the proponent of the fair use defense- in *Campbell* to summary judgment. 510 U.S. at 594. That comment, however, like the Court's isolated comment in *Sony* that "every commercial use of copyrighted material is presumptively... unfair...," must be read in the context of this Court's emphasis of the need for a sensitive balancing of interests, as well as the context of the specific circumstances presented in *Campbell.* When viewed in context, it is clear that the comment has no application here. Here, the evidentiary use of the manuscript was clearly noncommercial and there was no prior commercial market for the manuscript. The "Oh, Pretty Woman" song had a twenty five year history of commercial use before its lyrics were borrowed for the subject parody, and, as illustrated by its then sales of almost a half million copies, the parody itself had a demonstrated track record in the market place. This backdrop of commercial use and

demonstrable commercial impact is not present in this noncommercial use case.

In addition to being taken out of context, Petitioner's attempt to turn *Campbell*'s comment regarding the silence of the *Campbell* record into a general rule (applicable to both commercial and noncommercial use cases) that judgment on the basis of fair use can never be granted unless there is evidence in the record concerning the effect of the use on the potential market for the copyrighted work is inconsistent with the basic principle underlying the *Campbell* decision, namely, that hard evidentiary presumptions or inferences (save perhaps verbatim copying of an original for commercial purposes) are not appropriate for the four factor fair use analysis. In this regard, acceptance of Petitioner's argument would in essence result in the practical creation of a presumption of market harm in any noncommercial use and would allow the person challenging the fair use to prevent its reasonable application simply because the lack of (as opposed to evidence of) market harm was not established by the noncommercial user. Such a suggestion is inconsistent with this Court's recognition of a distinction between commercial and noncommercial cases and its related instruction in *Sony* that where a use is for a noncommercial purpose, the likelihood of significant market harm "must be demonstrated." 464 U.S. at 598.

In addition to being at odds with this Court's *Sony* decision and the Fourth Circuit's understanding of the law, Petitioner's position is flatly inconsistent with the post-*Sony* and post-*Campbell* views of the Fifth, Sixth, and Ninth Circuit courts of appeals. *See Veeck v. Southern Building Codes Congress International,*

Inc., 241 F.3d 398, 410 (5th Cir. 2001) ("[w]hen...the use of a copyrighted work is noncommercial, defeating a fair use defense requires 'proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work'"); *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1016 (9th Cir. 2001) (quoting *Sony*, stating that "the proof required to demonstrate present or future market harm varies with the purpose and character of the use" and noting that the plaintiffs submitted evidence to show that unauthorized use harms the market for plaintiffs' copyrighted materials); *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381, 1385-86 (6th Cir. 1996) ("The burden of proof as to market effect rests with the copyright holder if the challenged use is of a 'noncommercial' nature.").

CONCLUSION

There is no reason for this Court to grant Petitioner's request. The United States Court of Appeals for the Fourth Circuit properly applied the § 107 four factor "fair use" analysis to the undisputed facts of this specific case. The decision of the Fourth Circuit is not in conflict with any other United States court of appeals but rather is in harmony with decisions elsewhere. The Petition should be denied.

Respectfully submitted,

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